Supreme Court, U. S.
FILED
JUN 11 1975
MICHAEL RODAK, JR., CLERK

No. 74-1217

In the Supreme Court of the United States

OCTOBER TERM, 1974

ALBERT E. ANDREWS, III, PETITIONER

v.

LIEUTENANT GENERAL WILLIAM KNOWLTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner filed suit in the United States District Court for the Southern District of New York seeking both a declaratory judgment as to the validity of the administrative determination that he had violated the Cadet Honor Code of the United States Military Academy and an injunction to prevent his separation from the Academy for that reason. The district court granted summary judgment for the defendants dismissing the complaint (Pet. App. 21a-31a) and the court of appeals affirmed (Pet. App. 1a-20a).[1]

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[1]In the court of appeals petitioner's case was consolidated with that of another dismissed West Point cadet, who has not sought review in this Court.

1. On February 4, 1973, Military Police saw petitioner, a West Point cadet then on leave, on campus out of uniform, in an unauthorized vehicle containing alcohol (Pet. App. 3a). The authorities charged petitioner with "gross lack of judgment" (*id.* at 23a). As required by standard Academy procedures, on February 7, 1973, petitioner submitted a written explanation of the incident, in which he admitted that he had been present in the vehicle on campus. Because this report was incomplete, in that it did not state when petitioner was on campus in the vehicle, the authorities ordered him to submit a second statement specifying the relevant time period. On February 8, 1973, petitioner gave a second statement asserting that it had been for about fifteen to twenty minutes. This contradicted the previously submitted report of the Military Police, who saw the vehicle on campus for over two hours (*id.* at 4a). Recognizing a potential violation of the Cadet Honor Code, which states that "[a] cadet does not lie, cheat or steal or tolerate those who do," the Military Police officer immediately ceased his inquiry and referred the matter of petitioner's apparent lying to the Cadet Honor Committee (*id.* at 6a).[2]

In cases of suspected Honor Code violations, a committee of cadets known as the Cadet Honor Committee convenes, holds a hearing, and considers whether to allege an Honor Code violation. If it issues such an allegation, the cadet charged may, in the discretion of the Superintendent, have the option of resigning or being brought before an administrative Board of Senior Officers (*id.* at 5a).

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[2]A cadet who exhibits a "gross lack of judgment" is subject to demerit; a cadet who violates the Honor Code, however, is subject to dismissal from the Academy (Pet. App. 4a, 5a).

A Board of Officers considers the alleged Honor Code violation *de novo*; the adverse Cadet Honor Committee determination is entitled to no weight. A cadet brought before the Board of Officers has the right to a statement of the charges against him, the right to counsel, the right to impartial fact finders, the right to call and cross-examine witnesses, the right to offer relevant evidence and the right to object to the introduction of evidence offered against him. If the Board finds a violation of the Honor Code, the cadet has a right to file a "statement," constituting an appellate brief, with the Superintendent of the Academy, who, along with the West Point Staff Judge Advocate, considers the issues raised and approves or disapproves the action taken. A delegate of the Secretary of the Army conducts a second, independent view (*id.* at 5a-8a, 12a-13a).

In March 1973, the Cadet Honor Committee concluded that petitioner had violated the Honor Code by lying. In April 1973, the Board of Officers convened and gave petitioner a full hearing at which he was represented by counsel. The Board found that petitioner had committed the alleged Honor Code violation and its findings were affirmed at each of the subsequent levels of administrative review (*id.* at 7a-8a).

2. Petitioner maintains that his separation from the Academy would deny him liberty or property without due process because of procedural deficiencies in the proceedings before the Cadet Honor Committee (Pet. 12-19). The adverse determination of that Committee, however, did not itself result in petitioner's separation. Rather, the separation was based on the determination of the Board of Officers, whose proceedings (see *supra*) provided due process, as the court of appeals held (Pet. App. 12a-13a, 17a) and petitioner concedes (Pet. 17). The court of appeals properly found the Cadet Honor Committee to be "not unlike a grand jury" (Pet. App. 15a), *i.e.*, "a charging

body whose decision had no effect other than to initiate *de novo* proceedings before a Board of Officers" (*id.* at 17a).[3] Accordingly, petitioner's separation was no more subject to challenge on due process grounds because of the absence of certain procedural rights at the Committee stage than is a criminal conviction tainted by the comparable absence of rights before a grand jury.[4]

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[3]Petitioner complains that one consequence of the Committee's adverse determination was that, although still permitted to attend class, he was required to live in a special "Boarders Ward" for the one month period between the determinations of the Committee and the Board of Officers. Even if this marginal restriction of privileges implicated the due process clause of the Fifth Amendment (compare *Wolff* v. *McDonnell*, 418 U.S. 539, 558-559, 571-572, n. 19), petitioner's contention is not properly presented in this case. Having been separated from the Academy on the basis of the Board of Officers' determination that he violated the Cadet Honor Code, petitioner is no longer subject to that restriction and, since this is not a class action, his claim in that regard is moot. Compare *Gerstein* v. *Pugh*, No. 73-477, decided February 18, 1975, slip op. 6-7, n. 11. For the same reasons, no live controversy exists concerning petitioner's claim that the Cadet Honor Committee's adverse ruling "could have resulted" in social ostracism and ignominy in the eyes of his fellow cadets (Pet. 7).

[4]That some of his fellow cadets or other military officers might have attached adverse consequences to the Committee's adverse determination even if petitioner had been vindicated by the Board of Officers does not mean that the Committee's proceedings were constitutionally deficient. It is equally likely that civilians often suffer similar consequences because they have been indicted by a grand jury even if they have since been acquitted at trial. In any event, as the court of appeals properly held (Pet. App. 18a), having been found guilty by the Board of Officers, petitioner has no standing to complain about what might have happened as a result of the Committee's adverse decision if he had been vindicated by the Board. Cf., *e.g.*, *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 166-171; *McGowan* v. *Maryland*, 366 U.S. 420, 429-431.

3. Petitioner's contention that the district court erroneously barred discovery to establish whether the finding by the Cadet Honor Committee had an adverse impact on the Board of Officers (Pet. 23-26) is also without merit. When asked by petitioner's counsel at the hearing before the Board, the Officers said they would not be influenced in any way by what had previously happened in the case (Pet. App. 16a, n. 2). As the court of appeals correctly noted (Pet. App. 16a):

> On the basis of a mere assertion that a West Point officer, sitting as a member of the Board of Officers, cannot fairly consider the evidence against a West Point cadet, the court below properly rejected the request to take deposition testimony of the officers. The judicial process, taken after administrative fact-finding, does not lightly accept a challenge to the fairness of the hearing officer. * * * Nor is judicial inquiry into the mental processes of the hearing officer favored.

4. Finally, petitioner alleges that his second report could not be used as the basis for a charge that he lied because the Academy authorities did not give him *Miranda* warnings (Pet. 26-31). This contention is without merit. The court below correctly held that "failure to give warnings cannot excuse subsequent false statements offered by a suspect in order to exculpate himself" (Pet. App. 19a). As the district court correctly noted (Pet. App. 25a):

> Were [the rule to be] * * * otherwise, one would be well-advised to give false testimony, in hope of avoiding prosecution for the offense originally charged with assurance that there could be no prosecution for the perjury by which such result had been achieved.

> When the policy considerations behind *Miranda* * * * are examined, it becomes evident that the purpose in requiring warnings is to deter the building of criminal cases by the expedient of coercing confessions from suspects or defendants. This policy would be in no way furthered by ruling that defendant may not be held accountable for lies told in deliberate effort to avoid prosecution.

See also *United States* v. *Knox*, 396 U.S. 77; *Bryson* v. *United States*, 396 U.S. 64, 72.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

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[5]Petitioner does not claim, and the record does not suggest, that the request that he submit a second report covering the duration of his already admitted presence in the unauthorized car was intended primarily to entice him to lie, leaving no alternative to that but confession to a violation. Accordingly, even if the differences in context between criminal proceedings and Honor Code proceedings are ignored, there is no reason to hold this case for the disposition of *United States* v. *Mandujano*, No. 74-754, certiorari granted March 24, 1975, which presents the question whether a "putative defendant" may be prosecuted for perjury committed when testifying before a grand jury without having been given complete *Miranda* warnings.